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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/759,788	01/16/2004	Thomas T. Yamashita	YAMA-009	8159

24353 7590 09/26/2006

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EXAMINER
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LEVY, NEIL S

ART UNIT	PAPER NUMBER
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1615

DATE MAILED: 09/26/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

**Application No.**

10/759,788

**Applicant(s)**

YAMASHITA, THOMAS T.

**Examiner**

NEIL LEVY

**Art Unit**

1615

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 7/3/-06.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-8,10,11,13,14 and 21-37 is/are pending in the application.
- 4a) Of the above claim(s) 16-37 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-8,10,11,13,14 and 16-20 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☒ Claim(s) 1-8,10,11,13,14 and 16-37 are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)          | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

### **DETAILED ACTION**

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 21-37 stand withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected invention & species, there being no allowable generic or linking claim. Election was made **without** traverse in the reply filed on 1/23/06.

#### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claim 4, 6, 17 ARE rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

INORGANIC COMPOUNDS is not limiting, as copper hydroxides for example, is cited. Claim 6 is to a pesticide which is phytotoxicity reducing- it is not clear what the meets & bounds of the claim are intended, as the pesticide is not effective as pesticide, but rather as phytotoxicity reducing- however, this is not clearly seen in the specification. Claim 17 needs a . . .

#### ***Claim Rejections - 35 USC § 102***

Claims 1-2, 5-8, 10, 11, 13, 14 –20 are rejected under 35 U.S.C. 102(b) as being anticipated by Yamashita –5549729

The well known entomopathogenic pesticide, of natural & genetically modified forms (neither are specified, thus all B. t. are included) are provided in compositions to treat seeds (example 9). These compositions include Bright Sun, example 1, which is the inventive composition satisfying all of instant claim (b-e), & at the reequired dependent claim ratios.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-8,10,11,13,14, & 16-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Summers-3514516 in view of Yamashita-5549729.

Summers provides nematocidal & fungicidal compositions to soil, with reduction in phytotoxicity (col. 2, 7 col. 4- formulations) & include the instant sodium aluminofluoride (col. 7). Application with other pesticides & soil amendments is acknowledged (col. 9, top), but not exemplified.

Yamashita (above) provides examples of soil amendments useful for nematoatode control (Example 10 –bright sun).

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Summers (above) shows the instant invention, but not specifically with amendments or fertilizer ingredients specified, such as the molasses , macro & micro nutrients as instantly claimed. Yamashita shows these components as soil amendments as Bright Sun.

It would have been obvious to a person of ordinary skill in the art at the time the invention was made, desiring to utilize pesticidal compositions having reduced phytotoxicity, to use one of those well known in the art, as exemplified by the primary reference, with selection of the added nutrient concentration effective ingredients in order to control nematodes, while also fertilizing. Summers provides the motivation to add fertilizer with phytotoxicity reduction potential, as Summers is directed at such compositions, & specifically states @ col. 9, lines 8-10 to add fertilizer.

All the elements of the instant invention are disclosed. The amounts and proportions of each ingredient are result effective parameters chosen to obtain the desired effects. It would be obvious to vary the form of each ingredient to optimize the effect desired, depending upon the particular pest species and crop interest, reduction of toxicity, cost minimization, enhanced, and prolonged, or synergistic effects.

Applicant has not provided any objective evidence of criticality, non-obvious or unexpected results that the administration of the particular ingredients' or concentrations provides any greater or different level of prior art expectation as claimed, and the use of ingredient for the functionality for which they are known to be used is not a basis for patentability.

The instant invention provides well known old art recognized compounds, with well known art recognized effects, applied by well known methods to achieve control over pests while also fertilizing, as is well known in the art.

Applicant's arguments filed 7/3/06 have been fully considered but they are not persuasive. See the new rejections, in response to amendments which overcame rejections of record, as argued by applicant. We find numerous documents directed at combination compositions of fertilizer or soil amendment with pesticide.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to NEIL LEVY whose telephone number is 571-272-0619. The examiner can normally be reached on Tuesday-Friday, 7 AM to 5:30 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, MICHAEL WOODWARD can be reached on 571-272-8373. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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A handwritten signature in black ink, appearing to read "Neil Levy".

NEIL LEVY  
Primary Examiner  
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